



July 12. 1736.

INFORMATION

F O R

His MAJESTY'S Advocate, for his
Highness's Interest;

A G A I N S T

JOHN PORTEOUS late Captain-Lieutenant of the City-Guard of *Edinburgh*, Pannel.



HE Pannel is charged by the Indictment, with *murdering, slaughtering, maiming and wounding* diverse of his Majesty's Subjects, by firing with his own Hand, and causing and ordering a Band of armed Men under his Command, to fire upon a Multitude of *innocent People*, assembled to see an Execution in the *Grass-market* of the City of *Edinburgh*, without any just Cause or Provocation; contrary not only to the Laws of God and Nature, and

and to the good and laudable Laws of this and all other well governed Realms, but also contrary to the expresse *Duty of his Office*, who was one of the Commanders of the City-Guard, intended to preserve the Peace of the City, and to protect the Inhabitants thereof from all Violence, and who was on that Occasion entrusted with the Command of a large Detachment of the said Guard, to preserve Peace and Order, to secure the Execution of a Sentence of the High Court of Justiciary, and to prevent all Riots and Tumults, whereby the Execution of the said Sentence might be disappointed, the Laws might be violated, and the People assembled might be hurt or destroyed.

The Indictment sets forth particularly, That at the Time and Place libelled, where a great Multitude of innocent Persons of all Ages, and of different Sexes were lawfully assembled, to see the Execution of *Andrew Wilson*, sentenced to be hanged by the High Court aforesaid, the Pannel having under his Command a Detachment of Seventy armed Men of the City-Guard; and having conceived a most wicked and malicious Purpose of destroying, maiming and wounding Numbers of his Majesty's Subjects, the Inhabitants of the said City, and others assembled at the said Execution, without any just Cause or necessary Occasion, ordered the said Detachment under his Command to fire upon the People so assembled; That the Men under his Command, having probably in his Apprehension, fired over the Heads of the People, he with Threats and Imprecations, repeated his Commands to fire, calling out to them to level their Pieces and be damn'd; That at or about the same Time, he level'd the Firelock that was in his own Hand, taking Aim at one *Charles Husband*, and fired at him, whereupon he immediately dropt to the Ground, having received Wounds, whereof he instantly died; at least that he levelled his Piece, seeming to take Aim at some one in the Croud, and fired it; and that upon his firing, the said *Charles Husband*, or one or other of the Persons in the Indictment mentioned dropt, having received Wounds by Bullets, of which they instantly died; and that by his Commands and Example, several of the City-Guard under his Command,

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Command, fired upon the *innocent* Multitude, whereby the Persons particularly mentioned in the Indictment, were *killed, maimed or wounded.*

The Indictment further charges, That not contented with this *Barbarity*, the Pannel, after he had marched off his Detachment towards, or unto the Place or Street called, the *West-Bow*, again ordered the Men under his Command *to face about and fire upon the People*, and at or about the same Time, fired a *Musket* or *Firelock* that was in his own Hand, having either re-loaded, or caused to be re-loaded the Piece formerly fired by him, or having taken another out of the Hand of one of the Guard; and that several of the said Guard did upon that second *Example and Command*, fire upon the Multitude, whereby the Persons described in the Indictment were *killed, or mortally wounded*: And the Indictment concludes in common Form, that the Pannel is *guilty*, or *Actor Art and Part* of the Crimes aforesaid, or *one or other* of them.

The Charge in this Indictment is so heinous, that one should have imagined, it would have been *decent* in the Pannel, to have made no Objection to the *Relevancy*, and to have founded upon no Defence for avoiding the Effect of the Libel, *if true*, but to have contented himself with a flat *Denial* thereof, reposing himself upon his Innocence, if he is truly not guilty of the Facts alledged, without any other Desire, but that of having a fair Examination of unbyassed Witnesses, to be produced by him as well as the Prosecutor, in order to discover the real Circumstances of the Transaction.

But his Procurators, it seems, thought it their Duty to move every Objection against the *Relevancy* of the Libel, and to offer every *Defence* that their Invention could suggest, from a particular Relation of the Circumstances of the whole Transaction, which they laid before the Court upon the Pannel's Information, and which they offered to prove, to make good their Defence.

They informed the Court therefore, on Behalf of the Pannel, That the Magistrates apprehending, that some violent Attempt
might

' might be made for rescuing *Wilson*, the Offender sentenc'd to be
 ' hang'd, had ordered the Pannel to attend the Execution, with
 ' the greatest Part of the City Guard, to support and protect the
 ' Executioner in the Discharge of his Office, with Directions to
 ' *repell Force by Force*; that to make those Directions effectual,
 ' *Powder and Ball* were by the *Town's Treasurer* delivered out of
 ' the *Town's Magazine* to the City Guard the Morning of the Exe-
 ' cution, with Directions to load their Pieces; that besides this Pre-
 ' caution, the Danger of the Rescue appeared to the Magistrates
 ' so great, that they desired of *General Moyle*, and obtained a
 ' Detachment of the regular Troops, who were posted near to
 ' the Place of Execution, in order to support the City Guard, if
 ' there had been Occasion, and whose Commanders were told,
 ' that the *Lord Provost* would give them Authority to *fire*, if it
 ' should prove necessary; that the Pannel with the Town Guard
 ' attended accordingly the Execution; that when the Offender
 ' was hung up on the Gibbet, the Magistrates retired from the
 ' Scaffold, and repaired to a House over against it in the *Grass-*
 ' *market*, that after the Offender had been hung up for some
 ' Time, the Multitude became *unruly*, and begun to sling *Stones*
 ' *of great Size* and with great *Violence*; that some of the Guard
 ' were thereby hurt, one had his Shoulder Blade broke, others
 ' were bruised, and the Timber of the Drum was beat to Pieces;
 ' that the *Insolence* of the *Mob* growing still greater, and they
 ' pressing from all Sides upon the Guard, the Pannel, who appre-
 ' hended they might have intended to carry off the Criminal, who
 ' by this Time was cut down, in order to attempt the recovering
 ' him to Life, found it necessary for him to keep off the Multi-
 ' tude by *Threats* and *Menaces*; that to this End he presented his
 ' Piece, first to one Quarter and then to another, calling to the
 ' People to *stand off*, and *threatning* that if they did not, he would
 ' *fire*; that nevertheless he neither *fired himself*, nor gave any Or-
 ' ders to *fire*, but on the contrary, when some of the Guard, pro-
 ' voked by the Hurts they received, had, without his Orders or
 ' Authority, presumed to fire, whose Example was followed by
 ' several

several others, he did all he could to prevent that Mischief, by commanding them to desist, and actually did beat down the Muzzle of one of the Men's Pieces, who was presenting it in order to fire; that finding he could not be obey'd, he endeavoured to march off his Men, and prevailed with several of them to follow him some small Way up the *West Bow*, when again some of those Men who followed him, provoked by what, he did not know, faced about, and fired towards the *Grass-market*; that the first Notice he had of this Firing was by hearing it, which made him turn about in order to stop it; that at this last Place he neither fired, nor gave Orders to fire; that he marched as many of his Men as he could gather together back to the City Guard Room; that there he prevented the Mens cleaning their Pieces, that the Guilty who fired might be distinguish'd from the Innocent who did not fire; that his own Piece had not at that Time been at all fired; that conscious of his Innocence, and that he had on this, as well as on every former Occasion, done his Duty with *Patience* and *Temper*, he presented himself before the *Magistrates*, whereas nothing was easier for him than to have made his Escape, and that in their Presence the Firelock which he had in his Hand was presented, and appeared not to have been at all fired; and that therefore it was impossible the *Lybel*, as lybelled, could be true.

From this, which was said to be the State of the Case, the Procurators for the Pannel contended, first, ' That the Lybel was insufficient, as not describing with proper Accuracy, the particular Part of the Street, where the Person supposed to be shot by the Pannel stood, and his Situation with respect to the Pannel at the Time, because thereby the Pannel was deprived of the Opportunity of making his Defence, by founding it particularly on Circumstances, which he might avail himself of, if the *Position* and *Situation* had been distinctly described.'

To this it was and is answered, That the Libel is as particular as the Law requires, describing the Street where the Execution was had, which is all that the utmost Scrupulosity could expect

in such a Case. Minute Circumstances cannot be known to the Prosecutor, or certainly discovered, but by Proof upon the Trial: Every Circumstance of the Pannel's own Acting must be known to him; and therefore, if from the *Position* or *Situation* in which he was at the Time of the *Firing*, he can show that it was impossible he could have killed the Person whom he is charged to have shot, describing and proving those Circumstances, he may have Advantage from them; but cannot object to the Prosecutor, that he did not *minutely* describe a Situation that was not known to him, and which describing perhaps erroneously, might minister an unjust Occasion to a Criminal to escape Justice: Wherefore this Objection to the Form of the Indictment, ought to be repelled.

But in the *second* Place, the Procurators for the Pannel, very *unnecessarily*, one should think, if he is innocent of *Firing*, or ordering to Fire, and in some Degree *inconsistently* with *that Plea*; alledged, 'That the delivering out Powder and Ball to the City-guard, the ordering so great a Detachment to attend, the calling for the regular Troops to support the Town-guard, the Intimation to the Commander of those Troops, that they should have Orders to fire, in Case of Necessity, and the Direction to the Pannel to support the Execution of the Sentence against *Wilson*, and in Case of a violent Rescue or Deforcement, to *repel Force by Force*, amounted to a flat Order from the Magistrates to fire, when it became necessary: And that the violent Assault made by the Mob as aforesaid, with *Stones*, which were to be considered as *lethal Weapons*, in order, as the Pannel believed, to carry off the Offender, in Hopes of recovering him to Life, made it necessary to *repel Force by Force*: Wherefore these Circumstances to infer the Order, and the violent Assault of the Mob as mentioned, ought to be sustained and admitted to Proof, as a *total Defence* against the Indictment, at least as Circumstances fit to *mitigate the Punishment*, and restrain it from the *pena ordinaria*; since the Pannel being *versans in licito*, and engaged in the Discharge of a lawful Piece of Duty, if any *Excess* was
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committed by him, it ought not to be attended with *capital Punishment*, but ought to be corrected *extra ordinem*, according to the Degree of the *Excess*.

To this it was answered, That tho' it were true, which is not at all, upon the Part of the Prosecutor denied, that the Magistrates, upon just Apprehension of Disorders, and an Attempt for a violent Rescue of the Criminal who was sentenced to die, had ordered Powder and Ball to be distributed to the Guard, had increased their Numbers, had obtain'd Assistance from the Commander of the Regular Troops, with Assurance, that in Case of Necessity they should be authorized to Fire, had directed the Pannel at all Hazards to support the Execution, and prevent a violent Rescue, and had even told him, that in Case of Necessity he was to *repel Force by Force*, it will not in the least follow, that those Orders could in any Degree justify him, *except* in Case of Necessity, *except* there had been an Attempt towards a violent Rescue, which could not otherwise have been prevented, and *except* all the proper Precautions for dissipating otherwise the Mob, and for legitimating the Act of Firing upon them, had been previously made Use of.

For in the *first* Place, no Order from any Civil Magistrate whatever, can justify a *Barbarity* so horrid, as that which is charged on the Pannel. Had the *Provost*, and all the Magistrates of *Edinburgh*, been present on the Spot, and had they ordered him to fire upon the innocent People, when there was no just Cause for so doing, those Orders indeed might subject the Magistrates, as well, to the penal Consequences that attend *Murder*, but could not in the least acquit him, who was not at all bound to obey such *illegal* Orders, and who therefore acted at his Peril.

In the *second* Place, It is not at all pretended, That the Pannel had any Orders express'd or implied to Fire, except the Violence of an Attempt to rescue, not otherwise avoidable, made it necessary. Had that been truly the Case, Firing possibly might have been the Pannel's Duty, the reading the *Proclamation* undoubtedly would have made it justifiable; and this the Magistrates knew, when

when they ordered Ammunition to be distributed, and invited the Regular Troops to their Assistance: But till it became necessary, when there was no Hazard of a *Rescue*, before any Disorder was sought to be quell'd, by the legal Precaution of reading the *Proclamation*, which is intended to intimidate Rioters, and to separate the innocent from the guilty, by giving due Notice to all thoughtless People, who without any *Malevolence* are mixt with the Multitude, to separate from the ill Meaning, it was the most cruel, as well as unjustifiable Act that has at any Time been heard of, to make Use of the Weapons that were put in the Hands of the Guard, for the *Security of the Peace*, and of the People, to destroy so many Innocents, who had not in any Degree offended.

For, thirdly, Tho' the Pannel mentioned the flinging of Stones, and the Size of some of them, with some Hurts received therefrom, yet the Libel charges, and he admits, that the Criminal was cut down before this trifling Provocation prevailed with any one to Fire: His Duty then, so far as concerned the Execution of the Sentence, was over: He alledges no Danger, nor can he in those Circumstances of a *Rescue*, no Invasion with *Fire Arms*, or other mortal Weapons, fit to deforce or destroy a Detachment of Seventy disciplined Men, with loaded Pieces and screwed Bayonets: How then can the *Exigence*, or the Orders defend him? If his Act had been absolutely necessary, some Defence might have been founded on that *Necessity* joined with his Orders: But when his Allegations, tho' they were true, do not point out the least *Necessity*, and are in Reality founded on nothing else than the customary Impertinence on such Occasions, of flinging Dirt and Stones at the Executioner, tho' the Provocation thereby given, might perhaps justify a choleric Man, for drubbing any of the Actors for their Wantonness, yet to be sure, it could not justify the Slaughtering of the Offender, far less can such Impertinence in a few Boys, or other idle People, excuse the Firing sharp Shot upon an innocent Multitude, whereby Numbers of his Majesty's Subjects were destroy'd: And therefore it seems to be beyond all Doubt, the Pannel can find

find no Shelter from those *Orders*, or the *Duty* he imagines lay upon him to *Fire*; and must therefore *stand* or *fall*, upon his *being*, or *not being* guilty of the *Facts* charged upon him.

The Procurators for the Pannel endeavoured to find an Argument for him, in a late Resolution of the Court, which suspended a Sentence of the Court of Admiralty, proceeding upon an Interlocutor that found it necessary for Soldiers, who happened to kill in the Execution of their Duty, when by Order attending Custom-house Officers, to prove, that the Killing was *necessary for the Defence of their Lives*, inferring from this Resolution, that the Court did not think it necessary for the Pannel to prove, that he was in *Danger of his Life*: And tho' all that their Observation necessarily implies were granted, they could have no Benefit by it, because in *this Case* the Pannel neither *does*, nor can *aver*, that the *Firing* which he was *personally* guilty of, and *ordered*, was *necessary* for securing the Execution of that *Trust* that was committed to him, or for preserving the Rights of the Crown, or any Subject.

Where a Man has by Law Weapons put in his Hand, to be employ'd, not only in Defence of his Life when attack'd, but in Support of the *Execution of the Laws*, and in Defence of the *Property of the Crown*, or *Liberty of any Subject*, he doubtless may use those Weapons, *not only* when his own Life is put so far in Danger, that he cannot probably escape without making use of them, *but also* when there is *imminent Danger*, that he may by Violence be disabled to execute his *Trust*, without resorting to the Use of those Weapons: But when the *Life* of the Officer is exposed to *no Danger*, when his *Duty* does not *necessarily* call upon him, for the Execution of his *Trust*, or for the Preservation of the *Property of the Crown*, or the Preservation of the *Property or Liberty of the Subject*, to make use of mortal Weapons, which may destroy his Majesty's Subjects, especially *Numbers* of them who may be *innocent*, it is impossible, from the Resolution of the Court of Justiciary hinted at, to expect any Countenance to, or Shelter for, the *inhumane Act*.

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And upon a Principle very near allied to this, the Pannel's Presence, that being *versans in licito*, and intrusted with the Execution of *Legal Orders*, any *Excess* that for lack of *Discretion* he may have been guilty of, cannot be punished *pœna ordinaria*, ought to be repelled; for 'tis obvious, the *Trust* reposed in him, and the *Duty* expected from him, was no more than to see the Execution perfected, and to resist any *violent Attempt to rescue*, which should disappoint the *Execution of the Law*. Now, when the Sentence of the Court of Justiciary was executed, when the Criminal was *hanged and cut down*, before any Person fired, the *Trust* reposed in the Pannel, and the *Duty* expected from him ceased: He was no longer an Officer employ'd, to that end for which the Fire Arms were loaded, and his Actions came to be estimated of by the same Rules that would have made them *lawful or unlawful* upon every *ordinary Occasion*, where no *particular Danger* threatned, and where no *necessary Service* was in View.

And therefore, as in such Cases, the Pannel must be convinced, that nothing short of being *constituted in immediate Danger of Death* without firing, could justify him or his Guard for making use of *loaded Fire Arms*, he must in Consequence acknowledge, that in the Case in Question, no *Danger of Life* which he could not have avoided, having threatned him or his Guard, he was absolutely *inexcusable* for firing, and that therefore his *mischievous and temerarious Act*, must be attended with the *bighest Penalty*.

An armed Man who assaults, and without just Cause destroys another Man tho' armed, and in no *particular Trust* or Confidence with him, the Law considers and demeans as a *Murderer*; but when the Captain of a City Guard, who has an armed Force committed to his Care, for the *Good and Safety of the Community*, thinks fit, upon any *slight Offence or Provocation*, to turn those Arms and that Force upon a Crowd of *Citizens lawfully*, as well as *innocently assembled*; he is, in Addition to the *Slaughter and Destruction* that ensues, *guilty of the most notorious Breach of Trust*, and for an *Example to others*, whom it may be necessary for the *Good of the Community* to trust, ought to be punished in the most severe

severe Manner. Men so *trusted* are under *double Tyes*, for besides the general Obligations of *Duty* and *Humanity*, a particular *Confidence* is reposed in them, which at the *Peril of their Lives* they ought to answer.

The Procurators for the Pannel complained, That in the *Indictment* he was charged with a wicked and *malicious Purpose* of *destroying, wounding and maiming* Numbers of his Majesty's Subjects; and by the Pannel's *sober and modest Deportment* on former Occasions, and the whole *Circumstances precedent* to the *melancholy Accident* now in Question, endeavoured to show, that he had no *premeditated malicious Design*. But this again was to no Purpose: The Prosecutor never heard, nor, so far as he knows, did ever any Man before this Time, complain of the Wickedness or *Inhumanity* of the Pannel, and he has received no Information, by which he can be induced to think, that for any *considerable Time* before the *Fact* complained of, the Pannel had *premeditated* the destructive Action of which he is accused. But then his Procurators very well know, that *firing and ordering to fire* imply, and are *Proof* of a *wicked and malicious Purpose of destroying* those that are fired at: *malitia and propositum procedunt iſtum* in the Construction of Reason as well as Law, and whoever wilfully murders and destroys his Majesty's Subjects, must be demean'd as a *Murderer*; if his malicious Purpose preceeded the drawing of the Tricker, or giving the Orders, *one Moment*, as much as if it had been pre-conceived a *whole Year*.

These *Shews of Defence*, rather than *Defenses*, being removed; the next Thing that comes to be considered, is the History of the Pannel's *Behaviour*, during the *melancholy Transaction*, which his Procurators offered to prove, and insisted, would, *if proved*, be a sufficient *Defence* against the Facts charged in the *Libel*.

But in this the *Prosecutor* can by no Means agree; for he takes it to be extremely plain, that every single Circumstance alledged by the Pannel *may be true*; and yet it *may also be true*, that he with his own Hand fired, and killed one or more of the *innocent People*.

People, and that he *ordered* the Men under his Command to fire.

It may, for Example, possibly be true, that he, at some Period or another of the Action, called out to the Multitude to stand off, or that he would fire; that he at some one Point or another of Time prohibited the Men to fire, and struck down the Pieces of such as were presenting them; and yet it may also be true, that he at some other Point of Time, gave the precise Word of Command to fire, and actually fired the Piece that was in his Hand. Before he lost his Temper, he might have threatened only; Before he took the Resolution of annoying, as well as after he saw Mischief done, he might have endeavoured to prevent a particular Act of Inhumanity; but his doing so at certain Periods, is no conclusive Evidence, that at other Points of Time, his Conduct might not have been very different.

Were his giving Orders, or actual firing *dubious*, the Circumstances mentioned for the Pannel, might create a strong Presumption for him: But if it shall be *proved*, as it is charged in the Libel, that he *actually fired* the Piece in his Hand oftner than once, and gave positive Orders to fire; What can it avail him, that at some other Periods of the Fray he behaved himself in a different Manner? Since both the *one* Allegation and the *other* may be true.

But the Procurators for the Pannel insisted, ' That tho' the Proposition they undertook to prove, was in some Degree a *Negative*, yet it was so circumstantiated as to be capable of a *positive Proof*; for they said that credible Witnesses could be produced, who would inform the Court and Jury, that *during the whole Frey*, they kept their Eyes upon the Pannel, and were attentive to his Actions; and that they could take upon them to say, that thorow-out the Scuffle he *did not fire his Piece*, nor order the Guard to fire, but that he *threatned to fire*, which might by Persons at a Distance, who heard the Word *fire* only pronounced, be mistaken for a *Command*, and that he presented his Piece only in a *menacing Posture*, but *without firing*, which might have misled the Spectators into an Opinion that he *did fire*, tho' he really *did not*, if
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any one who was near him happened to discharge his Shot *about the same Time.*

This Reasoning however, is manifestly defective, because the Evidence of Witnesses, who shall say they *did not see or hear*, bears no Proportion, in Point of Weight, to the Testimony of those, who shall, upon Oath, positively say, that they *did hear or see.*

And besides the obvious Reason for maintaining this Distinction in the common Case, there is a particular Consideration that supports it, in the Case of a *Fray or Tumult*, where *Shots are fired*, *Murder* ensues, and there is a general *Confusion and Surprise*. No one could possibly be so interested in keeping his Eyes upon the Pannel, when it could not be foreseen there would be Occasion to give Evidence touching his Behaviour, as not to be liable to be carried off from that Object, upon any *fresh Surprise* that happened in the Tumult: The *firing of a Shot*, the *flinging of a Stone*, the *extraordinary Behaviour* of any one of the *Multitude*, or of the *Guard*, might *imperceptibly* have drawn the Eyes and Attention of any Spectator from the Pannel, to that *new Object*, and prevented his seeing or hearing what he said or did in the mean Time: And therefore no Witness, or Number of Witnesses, who should take upon him or them to say absolutely, that the Pannel *did not at any Period* of the *Fray* fire, or order to fire, would at all be *credible*, at least most certainly they could not be *credited* against such Witnesses as should positively say, that they *saw or heard him fire, or order to fire.*

If Witnesses shall say against the Pannel, that they saw him present his Piece and fire; and for their *Causa scientia* shall aver, that they observed *Fire and Smoak* issuing out of the *Muzzle* of his Piece, and a Man drop down dead in the Place towards which he pointed it, will that Evidence be sufficiently contradicted by Persons, who may say they observed no such Thing, or that others of the Guard fired about the same Time, and at the same Place? 'Tis humbly thought it cannot; because this is setting up *negative*

Evidence only against *positive*, which neither *Law* nor *Reason* permits.

And if credible Witnesses shall aver, that the Captain distinctly *ordered the Guard to fire*, can it avail him, that other Witnesses heard him threaten the Crowd, that if they did not retire he *would* fire, without hearing the *positive Orders for firing* given? In a *Tumult* every Individual cannot possibly hear every Thing that passes; but then it is no Evidence, that particular Words were not uttered in a *Fray*, that *some* Persons present at the Fray did not hear or attend to them.

And the Pannel, in framing his Defence on this Article, does not seem to have attended to what is expressly libelled against him, that in great Anger he said to the Men under his Command, upon their firing over the Heads of the Multitude, *Level your Pieces and be damned*. Will this Circumstance, should it be proven, be at all consistent with that Part of the Defence, which tends to render the Expression *Fire* dubious? If the Pannel's Passion moved him to utter the Expression, *Level your Pieces and be damn'd*! Is it at all doubtful in what Sense the Word *Fire* was pronounced? These Things are, 'tis thought, too plain to be further insisted on.

The only remaining Circumstance, on which the Procurators for the Pannel seemed to lay Stress, was the Condition of his Firelock when the Action was over, and his *voluntary* presenting himself before the *Magistrates*, when he could have made his *Escape*, from which they would have inferred an *Impossibility* that he was guilty of *actual Firing*, his Firelock appearing not to have been discharged, and a strong *Improbability* that he was conscious of having given any *criminal Orders*, since without Necessity he freely presented himself to Justice.

Now as to these Matters, it must be observed, *first*, That the Condition in which the Pannels Firelock appeared, can yield no Evidence for him: A Piece that has been fired may be re-loaded, and so cleaned and brushed up, as to leave no Vestige or Mark of the former Firing; and the Piece which the Pannel made use of in fir-
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ing might have been changed, and another produced to the Magistrates in the room thereof.

But, 2^{dly}, The Indictment no where avers, that the Pannel made use of *his own Piece* when he fired. Where he is first charged with firing, no more is said than that he levelled the Firelock *that was in his Hand*, and fired it at *Charles Husband*. Now the Firelock that was in his Hand, might have been that belonged to *another Man*, as well as *his own*: And in the other Part of the Indictment, where he is charged with firing, it is said that he made use of a Musquet or Firelock that was *in his Hand*, having either re-loaded, or caused to be re-loaded *his own Piece*, or having taken another out of the Hand of one of the Guard: So that the Libel in every Article of it *may be true*, and proved; and yet it *may be also true*, that the Pannel did not fire *his own Piece*.

And as to the Article, That the Pannel, conscious of no Guilt, appeared *voluntary* before the Magistrates, when he could easily have made his Escape: It can possibly infer no Presumption for his Innocence, if the Facts charged in the Indictment are made good. Whoever shall be satisfied by the Proof, that the Pannel acted in manner libelled, must be convinced, that he was governed in his Actions by no Principle of *Discretion*, and must therefore lay no Weight upon an Act of his, which can yield no Inference, unless he is supposed to have been governed by *Discretion and Prudence*.

Having thus run over the several Circumstances of the Pannel's Narrative, the Prosecutor apprehends, he may safely conclude, that they cannot *jointly* or *separately* be sustained as a Defence against the Charge laid in the Indictment: Because, tho' every Circumstance alledged, were undeniably proved, the *unhappy Pannel* might nevertheless be guilty, and a positive Proof of the Facts charged must necessarily prevail with every unbiass'd Jury-man, to join in a *Verdict* against him.

The *Prosecutor* is nevertheless far from wishing, that the unfortunate Pannel should be deprived of an Opportunity of laying every Circumstance that may make for his Defence before the Jury
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by Proof, tho' he humbly insists they cannot be sustained as a Defence relevant to assoilzie from the Indictment. It is possible the Fact may come out otherwise in the Trial, when Witnesses are upon Oath, than it did when the Examination was taken in the Precognition; and should the Proof of the Indictment be in material Circumstances defective, the Evidence offered for the Pannel may have its Weight; wherefore, so far as the Forms of the Court will allow, the Prosecutor makes no Opposition to the indulging the Pannel to bring what legal Evidence he can, for the Information of the Jury.

It is far from being the Interest of the Crown, or of the Publick, that an innocent Man should suffer; but it is greatly the Interest of both, that a fair and strict Enquiry be made, where the Guilt lies, when a Massacre so cruel, and so dangerous happens, to the End, that if the Officer, who has Power put in his Hand for the Preservation of the Peace, and for the Protection of the People; should, from any unjust Motive whatever, make use of that Power in Breach of the Laws, to the Destruction of the People, he may be made an Example to restrain others in the same Circumstances, from the like monstrous and dangerous Abuses in Time coming.

In Respect whereof, &c.

DUN. FORBES.

Having thus run over the several Circumstances of the Cause, and the Proceedings in the Court, the Prosecutor appears, he may easily conceive, that they cannot jointly or severally be sustained as a Defence against the Charge laid in the Indictment: Because, the several Circumstances alleged, were undeniably proved, the necessary Inference might nevertheless be drawn, and a positive Proof of the Facts charged will necessarily prevail with every upright Juryman, to form in a Court of Law, that the Defendant is guilty. The Prosecutor is nevertheless far from wishing, that the unfortunate Pannel should be deprived of an Opportunity of laying every Circumstance that may make for his Defence before the Jury.